

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of the Commercial Spectrum)	WT Docket No. 05-211
Enhancement Act and Modernization of the)	
Commission's Competitive Bidding Rules and)	
Procedures)	
To: The Commission		

**COMMENTS OF
COUNCIL TREE COMMUNICATIONS, INC.**

Steve C. Hillard
George T. Laub
Jonathan B. Glass
Council Tree Communications, Inc.
2919 17th Avenue
Suite 205
Longmont, CO 80503
(303) 678-1844

September 20, 2006

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY.....	ii
I. INTRODUCTION	1
II. THE COMMISSION SHOULD ADOPT NO NEW RULES WITH RESPECT TO DESIGNATED ENTITIES IN RESPONSE TO THE <i>SECOND FNPRM</i>	4
A. The Designated Entity Program was Created to Avoid Excessive Concentration of Licenses and to Disseminate Licenses Among a Wide Variety of Applicants	5
B. As Shown in the Results of Auction 66, the Rules Adopted in the <i>Second Report and Order</i> in this Proceeding Have Done Grave Damage to the Ability of Designated Entities to Become Commission Licensees.....	8
C. Under These Conditions, the Commission Should Work to Restore the Designated Entity Program to Effectiveness, Not Institute Further Rule Changes to Restrict the Award of Designated Entity Benefits.....	18
III. CONCLUSION.....	23

SUMMARY

The Commission should adopt no new rules with respect to designated entities in response to the *Second Further Notice of Proposed Rule Making* in the captioned proceeding. As shown clearly in the results of recently-completed Auction 66, rules adopted by the Commission in its *Second Report and Order* in the captioned proceeding have done grave damage to the ability of designated entities to acquire licenses and participate in the provision of spectrum-based services.

Designated entities had won an average of 74 percent of licenses by value in the six major commercial mobile radio service license auctions in which designated entity preferences were offered in the past ten years. In Auction 66, however, designated entities won just 4 percent of licenses by value. The *Second Report and Order* followed a long period of decline in the number and quality of Commission incentives available to designated entities. Against this background, the rules announced in the *Second Report and Order* amounted to nails in the coffins of many designated entities hoping to enter the industry through Auction 66.

Under these conditions, the Commission should now work to restore the designated entity program to effectiveness, not institute further rule changes to restrict the award of designated entity benefits. The Commission must take care to see that its rules and policies promote the ability of small businesses and businesses owned by members of minority groups and women to become Commission licensees. At the moment, the Commission's rules and policies plainly are not having such an effect.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Implementation of the Commercial Spectrum) WT Docket No. 05-211
Enhancement Act and Modernization of the)
Commission's Competitive Bidding Rules and)
Procedures)

To: The Commission

**COMMENTS OF
COUNCIL TREE COMMUNICATIONS, INC.**

Council Tree Communications, Inc. ("Council Tree"), pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, submits these comments in response to the captioned *Second Further Notice of Proposed Rule Making* (FCC 06-52) adopted and released by the Commission on April 25, 2006.^{1/}

I. INTRODUCTION

Council Tree is an investment company organized to identify and develop

^{1/} See *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, Second Report and Order and Second Further Notice of Proposed Rule Making*, 21 FCC Rcd 4753 (2006) (hereinafter referred to as the "*Second Report and Order*" and the "*Second FNPRM*," respectively). A summary of the *Second FNPRM* was published in the Federal Register on June 21, 2006. See 71 Fed. Reg. 35,594 (June 21, 2006). In an *Order* released in the captioned proceeding on August 10, 2006, the Wireless Telecommunications Bureau extended the periods for comments and reply comments in response to the *Second FNPRM* to September 20, 2006 and October 20, 2006, respectively. See *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, Order*, DA 06-1617, ¶ 4 (Wir. Tel. Bur. rel. Aug. 10, 2006).

communications industry investment opportunities for the benefit of businesses owned by members of minority groups and women, recognizing that business success can accompany the meaningful diversification of communications facilities ownership. As part of this work, Council Tree has long been an active supporter of responsibly-managed government efforts to encourage the participation of new entrants in the communications industry. In 2003, Council Tree president Steve C. Hillard was appointed to the Commission's Advisory Committee on Diversity for Communications in the Digital Age, and he serves as chairman of the Committee's Transactional Transparency & Related Outreach subcommittee.

Among others, Council Tree works with members of minority groups, women, Indian tribes, and Alaska Native Regional Corporations organized by Congress under the terms of the Alaska Native Claims Settlement Act. In the competitive bidding context, the Commission is directed under Section 309(j) of the Communications Act to promote "economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women,"^{2/} and to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in

^{2/} 47 U.S.C. § 309(j)(3)(B).

the provision of spectrum-based services”^{3/} Given its investment mission, Council Tree has an interest in seeing that the Commission’s spectrum auction rules and policies reflect these mandates, making room for those who could otherwise be excluded under a system of competitive bidding.

Against this background, Council Tree urges the Commission to adopt no new rules with respect to designated entities in response to the *Second FNPRM*. As shown clearly in the result of the recently-completed auction of advanced wireless services licenses (“Auction 66”), rules adopted by the Commission in its *Second Report and Order* in the captioned proceeding have profoundly damaged the ability of designated entities to acquire licenses and participate meaningfully in the provision of spectrum-based services.^{4/}

Under these conditions, the Commission should work to restore the designated entity program to effectiveness, not institute further rule changes to restrict the award of designated entity benefits. For these reasons, and for the

^{3/} *Id.*, § 309(j)(4)(D). The Commission is also tasked to identify and eliminate regulatory barriers facing small businesses in the ownership of telecommunications facilities and provision of services. *Id.*, § 257.

^{4/} Council Tree, Bethel Native Corporation, and the Minority Media and Telecommunications Council have filed a petition for review of the rules established or modified in the *Second Report and Order* (and in the captioned *Order on Reconsideration of the Second Report and Order* released by the Commission on June 2, 2006) with the United States Court of Appeals for the Third Circuit. In that proceeding, Council Tree, Bethel Native Corporation, and the Minority Media and Telecommunications Council are seeking the vacatur of the rules established or modified in the *Second Report and Order* (and in the *Order on Reconsideration of the Second Report and Order*) and the nullification of Auction 66.

reasons set forth more fully below, the Commission should adopt no new rules with respect to designated entities in response to the *Second FNPRM*.

II. THE COMMISSION SHOULD ADOPT NO NEW RULES WITH RESPECT TO DESIGNATED ENTITIES IN RESPONSE TO THE SECOND FNPRM

In the *Second FNPRM*, the Commission seeks “comment on whether [it] should adopt additional rule changes that would restrict the award of designated entity benefits under certain circumstances and in connection with relationships with certain entities.”^{5/} The Commission should not do so. The designated entity program was created to satisfy the congressional directives that the Commission avoid an excessive concentration of licenses and disseminate licenses among a wide variety of applicants when awarding licenses through competitive bidding. The point of these congressional directives was to see that licenses would not go predominantly to those with the deepest pockets.

As shown clearly in the result of the recently-completed Auction 66, however, rules adopted by the Commission in its *Second Report and Order* in this proceeding have profoundly damaged the ability of designated entities to acquire licenses and participate meaningfully in the provision of spectrum-based services. Designated entities had won an average of 74 percent of licenses by value (as a percentage of net winning bids) in the six major commercial mobile radio service (“CMRS”) license auctions in which designated entity preferences were offered in the past ten years.

^{5/} *Second FNPRM*, 21 FCC Rcd at 4772.

In Auction 66, however, designated entities won just 4 percent of licenses by value (as a percentage of net winning bids), a level closest only to that seen in auction events where no designated entity preferences were offered at all. Meanwhile, the top four national wireless service providers dominated Auction 66 — acquiring 78 percent of the Auction 66 licenses by value (as a percentage of net winning bids) — a result that underscores the failure of designated entities to compete effectively for licenses. Under these conditions, the Commission should work to restore the designated entity program to effectiveness, not institute further rule changes to restrict the award of designated entity benefits.

A. The Designated Entity Program was Created to Avoid Excessive Concentration of Licenses and to Disseminate Licenses Among a Wide Variety of Applicants

The designated entity program was created to avoid excessive concentration of licenses and to disseminate licenses among a wide variety of applicants. The need for this approach was apparent even before the advent of the Commission's auctions authority. According to a 1993 House Budget Committee Report on the legislation that became the Omnibus Budget Reconciliation Act of 1993:

The Committee is concerned that, unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries.^{6/}

The Report explained that:

^{6/} H.R. Rep. No. 103-111, at 254 (1993).

One of the primary criticisms of utilizing competitive bidding to issue licenses is that the process could inadvertently have the effect of favoring only those with “deep pockets”, and therefore have the wherewithal to participate in the bidding process.^{7/}

On that basis, as part of the grant of auction authority under Section 309(j), the Commission was directed to promote “economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.”^{8/} To that end, the Commission was directed to consider alternative payment schedules and prescribe area designations and bandwidth assignments to promote these objectives^{9/} and to employ bidding preferences and other procedures to “ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services.”^{10/}

In the service of these directives, the Commission in 1994 fashioned a series of initiatives calculated to improve the ability of designated entities to become

^{7/} *Id.* at 255.

^{8/} 47 U.S.C. § 309(j)(3)(B).

^{9/} *Id.*, §§ 309(j)(4)(A), (C).

^{10/} *Id.*, § 309(j)(4)(D).

Commission licensees through competitive bidding.^{11/} In the case of broadband personal communications service (“PCS”), the Commission (1) set aside two broadband PCS spectrum blocks — totaling 40 MHz of spectrum nationwide, which was one-third of the entire broadband PCS spectrum allocation — for bidding by smaller businesses only; (2) offered bidding credits to smaller businesses and businesses owned by members of minority groups and women; (3) permitted designated entities to pay for certain licenses in installments; (4) made available a tax certificate for businesses owned by members of minority groups and women; and (5) reduced the upfront payment required for designated entities to bid for licenses in the set-aside spectrum blocks.^{12/}

In addition, the Commission affirmatively undertook to help new entrants attract and draw on the experience of established wireless industry firms and managers as a way to increase their odds of success.^{13/} And, the Commission worked to guard against an excessive concentration of licenses by creating block-

^{11/} See *Implementation of Section 309(j) of the Communications Act — Competitive Bidding, Second Report and Order*, 9 FCC Rcd 2348, 2389 (1994) (“*Competitive Bidding Second Report and Order*”).

^{12/} See, e.g., *Implementation of Section 309(j) of the Communications Act — Competitive Bidding, Fifth Report and Order*, 9 FCC Rcd 5532, 5580, 5603 (1994) (“*Competitive Bidding Fifth Report and Order*”); *Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403, 451 (1994) (“*Competitive Bidding Fifth MO&O*”).

^{13/} See, e.g., *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5603.

specific, service-specific, and CMRS spectrum aggregation limits.^{14/} Each of these initiatives was designed to contribute to the achievement of the objectives of Congress that designated entities have the meaningful opportunity to become Commission licensees through competitive bidding.

B. As Shown in the Results of Auction 66, the Rules Adopted in the Second Report and Order in this Proceeding Have Done Grave Damage to the Ability of Designated Entities to Become Commission Licensees

Contrary to this history of affirmative Commission efforts to see that designated entities have the meaningful opportunity to become Commission licensees through competitive bidding, recent Commission action has done grave damage to the ability of designated entities to succeed. In the *Second Report and Order*, *inter alia*, the Commission:

- doubled the duration of its unjust enrichment schedule for licenses acquired with bidding credits from five years to ten years,^{15/}

^{14/} See, e.g., *id.* at 5606; *Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order*, 8 FCC Rcd 7700, 7728 (1993) (restricting broadband PCS licensees to 40 MHz of broadband PCS spectrum in any geographic area); *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Third Report and Order*, 9 FCC Rcd 7988, 8100-01 (1994) (adopting the CMRS spectrum cap). When it adopted the CMRS spectrum cap, the Commission relaxed the attribution threshold from 20 percent to 40 percent in the case of ownership interests held in designated entity licensees as a means to make capital more readily available to new entrants. See *Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, Report and Order*, 11 FCC Rcd 7824, 7859-60 (1996) (“*Cincinnati Bell Remand Order*”).

^{15/} See *Second Report and Order*, 21 FCC Rcd at 4766-67.

- instituted a new unjust enrichment provision requiring full repayment of any bidding credit in many cases where the construction requirements applicable at the end of the license term has not been met,^{16/} and
- modified rules relating to spectrum leasing and resale arrangements to deprive designated entities of the value of their bidding credits if they lease, wholesale, or permit to be resold more than 25 percent of their “spectrum capacity” to any one party or more than 50 percent of their “spectrum capacity” in the aggregate.^{17/}

None of the new rules is limited to arrangements involving large, in-region incumbent wireless service providers as contemplated in the *Further Notice of Proposed Rule Making* in the captioned proceeding.^{18/} The new rules apply to all designated entities alike.

The effect of the new rules has been unmistakable. The new rules were first announced when the *Second Report and Order* was released on April 25, 2006, and the Commission made clear that the rules would apply to designated entities bidding in Auction 66.^{19/} Auction 66 opened on August 9, 2006. As shown in Chart 1, designated entities had won an average of 74 percent of licenses by value (as a percentage of net winning bids) in the six major CMRS license auctions in which designated entity preferences were offered during the past ten years. In Auction 66,

^{16/} See *id.* at 4767.

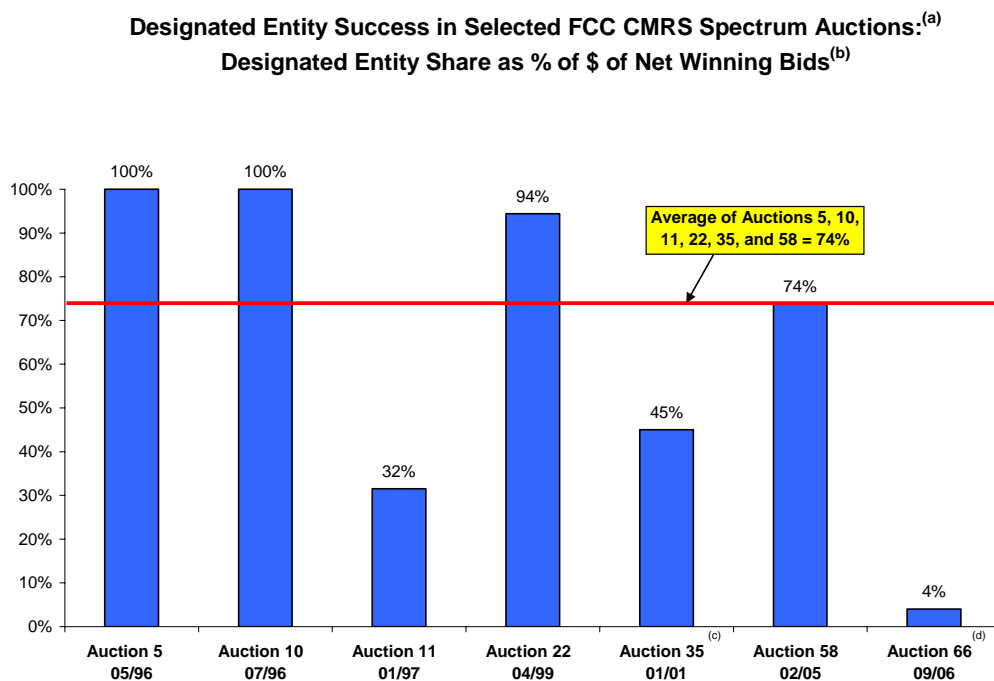
^{17/} See *id.* at 4763-64.

^{18/} See *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures, Further Notice of Proposed Rule Making*, 21 FCC Rcd 1753 (2006) (“FNPRM”).

^{19/} See *Second Report and Order*, 21 FCC Rcd at 4771.

however, designated entities won just 4 percent of licenses by value (as a percentage of net winning bids) — by far the lowest of any major CMRS auction in which the Commission offered designated entity preferences.

Chart 1

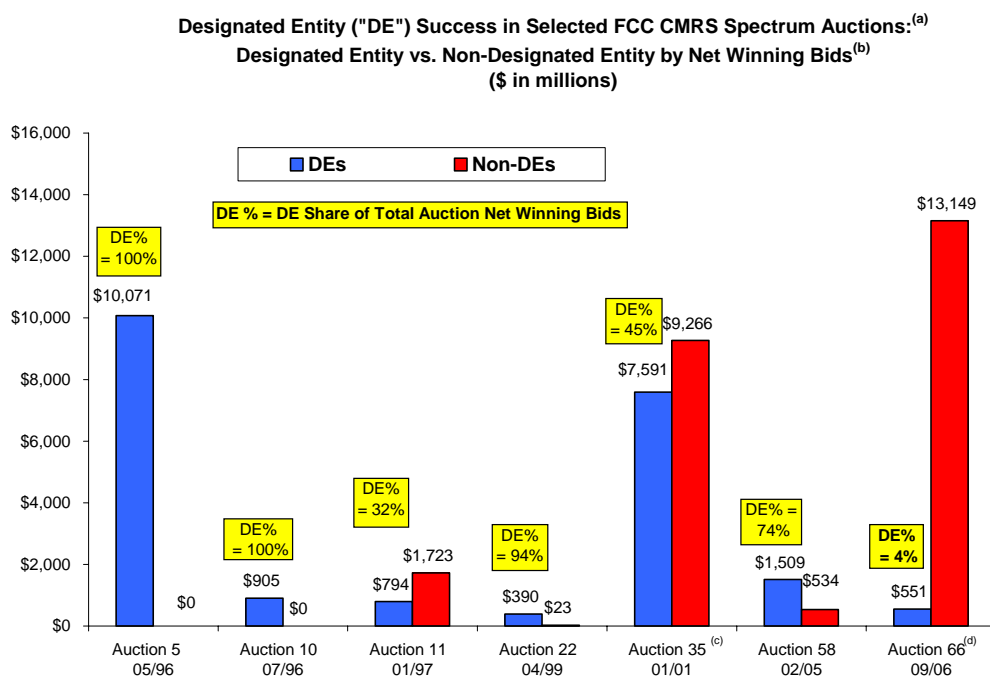


- (a) Auctions 5 and 10 included only closed licenses (*i.e.*, bidding reserved for designated entities only). Auctions 11, 22, 35 and 58 included both closed and open licenses (with open licenses available both to designated entities and non-designated entities and designated entities receiving bidding credits). Auction 66 is the only one of these competitive bidding events to include open licenses only.
- (b) Net winning bid is the gross winning bid less the amount of any designated entity bidding credit.
- (c) Auction 35 results overturned in part as a result of a ruling by the United States Supreme Court.
- (d) Winning bids as of close of Auction 66.

Indeed, based on the percentage of net winnings bids, the designated entity share of Auction 66 winnings is closest to the 0 percent share in Auction 4 (broadband PCS), where no designated entity preferences were offered at all and no applicant identifying itself as a designated entity won a single license.

As illustrated in Chart 2, designated entities have historically been very substantial participants in major CMRS license auctions, underscoring the past effectiveness of the Commission's designated entity program.

Chart 2



- (a) Auctions 5 and 10 included only closed licenses (*i.e.*, bidding reserved for designated entities only). Auctions 11, 22, 35 and 58 included both closed and open licenses (with open licenses available both to designated entities and non-designated entities and designated entities receiving bidding credits). Auction 66 is the only one of these competitive bidding events to include open licenses only.
- (b) Net winning bid is the gross winning bid less the amount of any designated entity bidding credit.
- (c) Auction 35 results overturned in part as a result of a ruling by the United States Supreme Court.
- (d) Winning bids as of close of Auction 66.

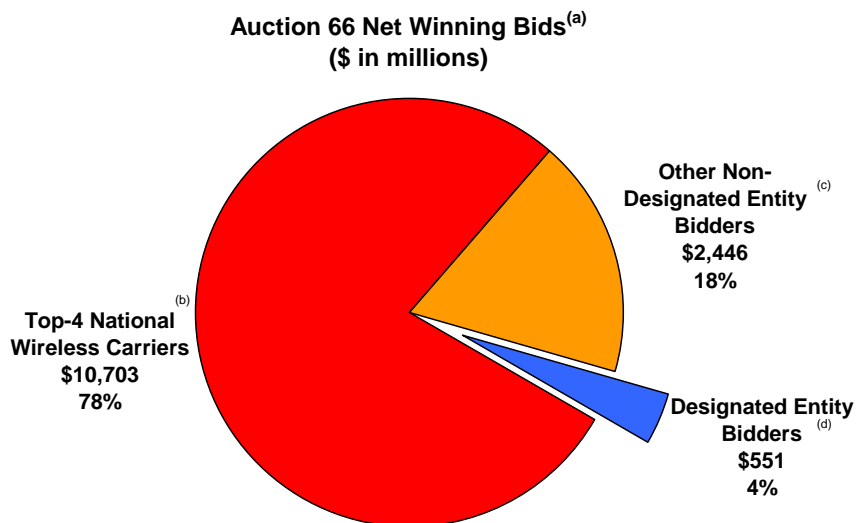
In the six major CMRS auctions prior to Auction 66, designated entities won a total of \$21.3 billion, demonstrating that designated entities had the capability of competing effectively for licenses offered by the Commission. In Auction 66, however, designated entities won just *\$551 million* of licenses by value (compared to the \$13.7 billion Auction 66 total), a result that pales in comparison to historical designated entity results in competitive bidding. In other words, in the single most important spectrum auction in this decade to date, competition from designated entities all but evaporated.

One consequence of this terrible reversal for designated entities is that the top four national wireless service providers dominated Auction 66. As Council Tree has shown, five national wireless service providers already had 90 percent of industry subscribers, 91 percent of industry spectrum (MHz-POPs), and 92 percent of industry revenue.^{20/} In Auction 66, this domination continued.

As shown in Chart 3, the largest four of these five carriers accounted for 78 percent of all winning bids in Auction 66 (compared to 4 percent for all designated entities):

^{20/} See Comments of Council Tree Communications, Inc., WT Docket 05-211, at 17-20 (filed Feb. 24, 2006) (“Council Tree Comments”).

Chart 3



-
- (a) Winning bids as of close of Auction 66. Net winning bid is the gross winning bid less the amount of any designated entity bidding credit. Total net winning bids are \$13,700.
- (b) Top 4 national wireless carrier bidders are T-Mobile License LLC, Cellco Partnership d/b/a Verizon Wireless, SpectrumCo LLC (Sprint and cable companies), and Cingular AWS, LLC.
- (c) Other non-designated entity bidders include 43 winning bidders.
- (d) There were 57 designated entity winning bidders in Auction 66.

The smallest of these dominant carriers — ALLTEL Corporation, Inc. — did not apply to participate in Auction 66. The success of the largest four national wireless carriers only reinforces the excessive concentration of licenses that Congress sought to avoid in enacting Section 309(j) of the Communications Act, and it underscores that the Commission’s designated entity rules are not serving the ends envisioned by Congress.

The *Second Report and Order* followed a long period of decline in the number and quality of Commission incentives available to designated entities in competitive bidding. In 1995, for example, Congress eliminated the availability of tax certificates for members of minority groups.^{21/} For its part, the Commission no longer offers the installment payment financing that so enhanced the ability of members of minority groups to acquire licenses in competitive bidding,^{22/} it no longer permits smaller businesses to qualify for an auction with a reduced upfront payment,^{23/} and it no longer sets aside licenses for bidding only by designated entities.^{24/} In addition, though it originally permitted designated entities to enter into management or joint marketing agreements with experienced firms without contravening the attribution thresholds in its entrepreneurs' block rules,^{25/} the

^{21/} See Self-Employed Health Insurance Act of 1995, Pub. L. No. 104-7, § 2, 109 Stat. 93 (1995) (eliminating the minority tax certificate program).

^{22/} See, e.g., *Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures, Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 15293, 15322 (2000) ("*Part 1 Fifth Report and Order*").

^{23/} See, e.g., *Cincinnati Bell Remand Order*, 11 FCC Rcd at 7859-60. Cf. *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5600.

^{24/} See, e.g., *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, Report and Order*, 18 FCC Rcd 25162, 25189-90 (2003) ("*AWS-1 Report and Order*") (resolving not to set aside any advanced wireless services licenses for bidding only by designated entities).

^{25/} See *Implementation of Sections 3(n) and 332 of the Communications Act, Fourth Report and Order*, 9 FCC Rcd 7123, 7124 (1994) ("*CMRS Fourth Report and Order*") ("We expect that investor/manager agreements are one of the many alternatives available to designated entities This does not mean, however, that

Commission *now* treats many management and joint marketing agreements as “attributable” under the controlling interest standard.^{26/}

This steady erosion of Commission efforts to help designated entities become licensees and provide service was also evident in the development of the specific competitive bidding rules for AWS spectrum. The Commission found that AWS licensees would face capital requirements and deployment challenges similar to those that confronted broadband PCS licensees in the 1990s.^{27/} In the case of broadband PCS, the Commission determined in 1994 that designated entities would not realize meaningful opportunities through spectrum auctions “unless we supplement bidding credits and other special provisions with a limitation on the size of the entities designated entities will bid against.”^{28/} As a result, the Commission set aside 40 MHz of broadband PCS spectrum nationwide for bidding by smaller businesses alone (in addition to offering bidding credits, installment

these management agreements will be deemed ‘attributable’ for purposes of the revenue thresholds in the entrepreneur’s blocks”); *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5601 n.135 (“So long as the applicant remains under the *de jure* and *de facto* control of the control group, we shall not bar passive investors from entering into management agreements with applicants”).

^{26/} See 47 C.F.R. § 1.2110(c)(2)(ii)(H)-(I). The threat of such attribution effectively places many strategic relationships with existing service providers — providers that benefit from economies of scale and scope — outside the reach of new entrants.

^{27/} See *AWS-1 Report and Order*, 18 FCC Rcd at 25218.

^{28/} *Competitive Bidding Fifth MO&O*, 10 FCC Rcd at 414-15 (emphasis added).

payment plans, and reduced upfront payments for these applicants and subjecting all licensees to spectrum aggregation limits).

When crafting its competitive bidding rules for AWS, however, the Commission refused to set aside any spectrum for designated entities *and* it refused to increase the AWS bidding credit level as an alternative^{29/} — something it had done in the past to offset the absence of other designated entity preferences.^{30/} Meanwhile, the Commission established no spectrum aggregation limit for AWS,^{31/}

^{29/} See *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, Order on Reconsideration*, 20 FCC Rcd 14058, 14075-77 (2005).

^{30/} See, e.g., *Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 175, 201, 215-16 (1994) (raising bidding credit offered to businesses owned by members of minority groups and women from 25 to 40 percent to help in bidding for licenses that were not within blocks set-aside for designated entities); *Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (“WCS”), Report and Order*, 12 FCC Rcd 10785, 10878-79 (1997) (raising bidding credit levels due to unavailability of installment payment financing for WCS licensees); *Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd 9972, 10013 (1997) (raising bidding credit levels due to unavailability of installment payment financing for 800 MHz SMR licensees); *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5 -29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Second Order on Reconsideration*, 12 FCC Rcd 15082, 15095-96 (1997) (raising bidding credit levels due to unavailability of installment payment financing for LMDS licensees).

^{31/} See *AWS-1 Report and Order*, 18 FCC Rcd at 25189.

and it had long since eliminated the CMRS spectrum aggregation limit^{32/} and the availability of installment payments and reduced upfront payments for designated entities.

As a result, in spite of its determination that AWS licensees would face the *same* capital requirements and deployment challenges as broadband PCS licensees, the Commission set the stage for designated entities to compete for AWS spectrum rights with far less Commission support than they ever had in the case of broadband PCS. Against this background, the new rules announced in the *Second Report and Order* amounted to nails in the coffins of many designated entities hoping to enter the industry through Auction 66.

The effects on designated entities going forward will be profound. As the Commission has indicated, designated entities have the *greatest* chance of becoming licensees through competitive bidding events such as Auction 66: “Although a lack of adequate capital is a critical barrier to entering business and successful auction participation by bidders, based upon the Commission’s experience, the auction process provides the best opportunity to date for designated entities to acquire licenses.”^{33/} The results of Auction 66 show that even this “best opportunity” is now being closed off.

^{32/} See 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services, *Report and Order*, 16 FCC Rcd 22668, 22693-95 (2001).

^{33/} *AWS-1 Report and Order*, 18 FCC Rcd at 25218 (emphasis added).

C. Under These Conditions, the Commission Should Work to Restore the Designated Entity Program to Effectiveness, Not Institute Further Rule Changes to Restrict the Award of Designated Entity Benefits

Under these conditions, the Commission should work to restore the designated entity program to effectiveness, not institute further rule changes to restrict the award of designated entity benefits. It has long been — and should be — the Commission’s policy to encourage new entrants to look to skilled industry participants for capital and expertise. Nevertheless, Council Tree urged the Commission to prohibit large, in-region incumbent wireless service providers from investing at material levels in or entering material operating arrangements with new entrants that receive competitive bidding preferences.^{34/}

As Council Tree showed in its comments in this proceeding before the *Second Report and Order*, this limited exception to the Commission’s general policy was appropriate because of the competitive impact of allowing those who already dominate the CMRS industry to partner with designated entities in material ways

^{34/} See *FNPRM*, 21 FCC Rcd at 1745. Council Tree also has urged the Commission to institute a personal net worth limitation for competitive bidding small business preference eligibility. See Council Tree Communications, Inc., Petition for Rulemaking, RM 10956 (filed March 8, 2004). According to the Commission, its rejection of the same Council Tree proposal in WT Docket No. 02-353 “effectively disposed of Council Tree’s petition for rulemaking.” *FNPRM* at ¶5 n.17. In the *Second FNPRM*, however, the Commission seeks “comment on whether [it] should reconsider its treatment of personal net worth in determining eligibility for designated entity benefits and if so, what changes [it] should adopt and why.” *Second FNPRM*, 21 FCC Rcd at 4783. In light of the recent damage done to the designated entity program, Council Tree urges the Commission to attend to the

in certain cases.^{35/} Council Tree urged the Commission to adopt a targeted, narrowly-tailored rule to address just that competitive side-effect. The Commission elected to take a very different approach in the *Second Report and Order* — with devastating consequences.

As a result, the Commission should now focus on restoring the effectiveness of its designated entity program. The dramatically poor showing of designated entities in Auction 66 — and the deterioration in the number and quality of incentives available to designated entities in competitive bidding — reflects the long decline in the diversification in the ownership of communications industries. The Commission must reverse this trend by working to see that its rules and policies promote the ability of small businesses and businesses owned by members of minority groups and women to become Commission licensees. At the moment, the Commission's rules and policies plainly are not having such an effect.

Central to this effort should be measures to promote investment in designated entities to enable them to acquire licenses and to build viable businesses. In fulfilling the mission given to it by Congress, the Commission long ago recognized that the lack of access to capital frequently limits the ability of

most pressing issues facing the program and restore it to effectiveness, not institute further rule changes to restrict the award of designated entity benefits.

^{35/} See Council Tree Comments at 26-31.

smaller businesses to compete with established telecommunications companies,^{36/} and it originally undertook to develop “preferences [that] will allow designated entities to overcome barriers that have impeded these groups’ participation in the telecommunications arena”^{37/}

On this basis, the Commission originally worked to promote the flow of capital and expertise from skilled industry participants to new entrants. The Commission explained in the course of refining its broadband PCS designated entity provisions that its new attribution rules would:

(1) promote investment in designated entities generally; (2) attract and promote skilled management for applicants; and (3) encourage involvement by existing firms that have valuable management skills and resources to contribute to the success of applicants.^{38/}

The Commission also expressly permitted designated entities to enter into management or joint marketing agreements with experienced firms without contravening the attribution thresholds in its entrepreneurs’ block rules.^{39/}

According to the Commission, “[i]nvestments by cellular providers in . . . designated entities should increase the entities chances for success in the auctions and later in

^{36/} See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2389-90.

^{37/} *Id.* at 2389.

^{38/} *Competitive Bidding Fifth MO&O*, 10 FCC Rcd at 441.

^{39/} See *CMRS Fourth Report and Order*, 9 FCC Rcd at 7124; *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5601 n.135.

service competition by providing access to capital and valuable industry experience.”^{40/}

When a designated entity relies on a strategic investor for funding and guidance, the interests of the strategic investor are aligned with those of the designated entity, and the two entities benefit jointly. The designated entity benefits by gaining access to capital and industry experience, and the investor benefits by the growth in the value of its investment if the designated entity business is run well. That type of relationship is critical if new entrants are to succeed in the capital-intensive, technologically-complex CMRS business.

Under the conditions created by the *Second Report and Order*, any new limitations now would threaten to further choke off designated entities’ access to sources of capital and industry experience — something the Commission should not entertain in the wake of Auction 66. The Commission is correct that the lack of access to capital is the central barrier to entry for designated entities competing to become Commission licensees through competitive bidding. In turn, whether a designated entity has access to sources of technical and industry expertise is often considered by lenders who are approached to loan funds to new entrants.

Preserving what sources of capital and expertise remain for designated entities —

^{40/} *Amendment of the Commission’s Rules to Establish New Personal Communications Services, Memorandum Opinion and Order*, 9 FCC Rcd 4957, 5008-09 (1994).

and removing barriers to new sources of capital and expertise — should be the immediate goal of the Commission.

Whenever it is regulating in this area, the Commission must proceed cautiously. Indeed, the Commission recognized this when it instituted the instant review of its designated entity rules in January, making clear that any changes should be made only with great care and only under the correct conditions:

In determining whether additional safeguards are necessary to ensure that bidding credits and other benefits are awarded to the appropriate entities, we recognize that we must strike a delicate balance between encouraging the participation of small businesses in the provision of spectrum based services, and ensuring that those small businesses who do participate in competitive bidding have sufficient capital and flexibility to structure their businesses to be able to compete at auction, fulfill their payment obligations, and ultimately provide service to the public.^{41/}

Now, in the wake of Auction 66, the results are clear. The Commission's new rules fail to encourage the participation of small businesses in the provision of spectrum based services, and they fail to ensure that those small businesses that do participate in the competitive bidding process have sufficient capital and flexibility to compete effectively. The "balance" to which the Commission referred in January was definitively not achieved. The Commission must now undertake to restore the designated entity program to effectiveness, not institute further rule changes to restrict the award of designated entity benefits.

^{41/} *FNPRM*, 21 FCC Rcd at 1757 (footnote omitted).

III. CONCLUSION

For these reasons, the Commission should adopt no new rules with respect to the designated entity program in response to the *Second FNPRM*.

Respectfully submitted,

/s/ Steve C. Hillard
Steve C. Hillard
George T. Laub
Jonathan B. Glass
Council Tree Communications, Inc.
2919 17th Avenue
Suite 205
Longmont, CO 80503
(303) 678-1844

September 20, 2006